

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2000B034

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

BRIAN GONZALES,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
YOUTHFUL OFFENDER SYSTEM,
Respondent.

Hearing was held on December 13-14, 1999 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Susan J. Trout, Assistant Attorney General. Complainant appeared in person and was represented by Charles F. Kaiser, Attorney at Law.

Respondent called the following witnesses: Mark A. Finley, DOC Investigator; Pamela Yeo, Shift Commander; Angel Medina, Manager of Security; Eloy Jaramillo, Shift Commander; Brian Gomez, Director, Youthful Offender System, Department of Corrections; and the complainant, Brian Gonzales. Complainant testified on his own behalf and called Kimberly Ann Thompson, Phase I Manager.

Respondent's Exhibits 1, 2, 3, 6 through 10, 13A, 13B, 13C, 13D and 14 and 15 were stipulated into evidence. Exhibit 12 was admitted without objection. Exhibit 11 was not admitted. Exhibits 4, 5, 15 and 16 were withdrawn.

Complainant's Exhibits A through P, R through V, X through CC and FF were stipulated into evidence. Exhibit DD was admitted over objection.

A witness sequestration order was entered excepting complainant and respondent's advisory witness, Brian Gomez.

MATTER APPEALED

Complainant appeals the disciplinary termination of his employment. For the

reasons set forth herein, respondent's action is rescinded.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
3. Whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant Brian Gonzales began employment with the Department of Corrections (DOC) in 1987 as a Correctional Officer (CO) I. He was promoted three times and served as a CO IV when his employment was terminated on September 10, 1999. He received performance appraisal ratings of either Good or Commendable for each of his final five years of employment. He is presently employed by Fleetwood Corporation.
2. Complainant served as the Shift Commander for the graveyard shift at the Youthful Offender System (YOS) since it opened in Pueblo on July 1, 1998. His work hours were 9:45 p.m. until 6:15 a.m.
3. Complainant's direct supervisor and appointing authority was Brian Gomez.
4. In July 1999, Acting Security Manager Pamela Yeo told Gomez that she had heard from three officers that complainant was seen in the Director's office possibly going through papers on the desk. Gomez had believed earlier that certain paperwork disappeared from his office, including the Glick report, which was an important and confidential report on the YOS program.
5. Gomez met with DOC Investigator Mark Finley of the Inspector General's Office and asked that surveillance equipment be installed in his office during the time that complainant was on duty.
6. On Wednesday, July 21, 1999, Finley and another investigator installed a hidden video camera and transmitter in Director Gomez's office.
7. On Thursday, July 22, Finley reviewed the video tape, which showed complainant entering the office at 11:48 p.m., staying for three minutes, and at 3:45 a.m., staying for twelve minutes. Each time complainant could be seen shuffling through and reading documents on top of the desk. He opened a drawer on the left side of the desk and pulled out and browsed through a file. He picked up papers that were on the bookshelf

behind the desk.

8. The surveillance video of the Thursday shift showed complainant entering Gomez's office at 5:15 a.m. and staying for three minutes. He shuffled through and looked at papers that were on the desk.

9. Gonzales worked the swing shift on Friday, July 23 and Saturday, July 24 instead of the graveyard shift, so the surveillance equipment was set up for those shifts. Complainant's work hours were approximately 2:00 p.m. to 10:00 p.m. His scheduled days off were Sunday and Monday.

10. The video showed complainant entering the office at 8:13 p.m. on Friday and staying for two minutes. He shuffled through and looked at the papers that were on the desk. There was no entrance by complainant on Saturday.

11. On Wednesday, July 28, Finley installed a hidden video camera in his own office at the YOS facility during the graveyard shift. He did not have a specific reason to believe that complainant, or anyone, was entering his office at night without authorization, but, because of the confidential nature of the investigative files kept in his office, he wanted to find out if his office was being entered as was the office of Director Gomez. A shift commander could gain access to Finley's office with a key kept at the control center.

12. Also on July 28, Finley typed a memorandum to Gomez indicating that the investigation of complainant was complete and that the file was on Finley's desk. Gomez agreed to leave the memo on his desk when he left for the day. The purpose of the memo was to see if it would cause complainant to enter Finley's office to read the file which, in fact, did not exist. This memo from Finley to Gomez said:

I have completed the investigation involving Captain Gonzales. I have serious concerns regarding this case! In addition to serious ethical/integrity issues involving this individual, I believe criminal charges are possible. Perhaps we should make an appointment with Mr. Suthers to discuss this matter?

I am not sure if I will be on the facility tomorrow. I left his file on my desk if you wish to review it. Let me know when you have some time so we can discuss this matter.

Exhibit T.

13. The July 28 memo was not a legitimate memo. It was not true. Finley did not seriously intend to make an appointment with DOC Executive Director Suthers to discuss the matter.

14. At approximately 11:37 p.m., complainant entered Gomez's office, shuffled through the papers on the desk and found the phony memo, which disturbed him greatly. He had no idea what it was about. He went across the hall to telephone the home of Major Kim Thompson, who was the second in command to Gomez. The call woke her up.

15. Complainant asked Thompson if she was aware that he was under investigation. She was not and asked him to read the memo to her. He went back to get it, read it to Thompson and returned it to Gomez's office. He wanted to call Gomez, but Thompson advised against doing so because it was around midnight.

16. Complainant entered the office again and left on Gomez's desk an operational memo (Exh. 1, pp. 35-39), a staff schedule for the graveyard shift (Exh. X) and a note saying he had borrowed a manual (Exh. AA). He was not trying to hide the fact that he had been there.

17. At around 7:00 a.m. on Thursday the 29th, complainant telephoned Director Gomez to say that he had read the memo and to ask if he was under investigation. Gomez answered in the affirmative but would not disclose the nature of the investigation. Complainant told Gomez that he had left some things on his desk.

18. The surveillance video for Thursday/Friday showed no entries into Gomez's office. The video of Finley's office, which covered Wednesday, Thursday, Friday and Saturday, showed no entries.

19. On Friday, August 6, Finley interviewed complainant regarding the investigation. In response to a question, and before being informed of the videotape, complainant acknowledged entering the Director's office. Gomez, who had viewed the first surveillance video with Finley, came by and delivered to complainant a letter of administrative suspension (Exh. 3).

20. There is no evidence that complainant removed anything except the July 28 memo, which he returned.

21. The desk drawers were not locked. No documents were marked "confidential." All shift commanders carry a master key that allows entrance into the Director's office. They occasionally have a reason to enter the Director's office when no one is there, such as to access regulations, use the VCR or drop off important documents. Commonly, the shift commanders will leave a note saying they had been there. Shuffling through papers and reading materials on the Director's desk or in the desk drawers is not a legitimate reason for a shift commander to be in the office. Complainant was not authorized to go through papers and files as he did.

22. Gomez, the appointing authority, held a Rule R-6-10 meeting with complainant, who was accompanied by his attorney, on August 27, 1999. They discussed

the seven reasons complainant had given the investigator for entering the Director's office, namely: 1) He is empowered to run the entire facility; 2) He is responsible for the training shift and needs to utilize tools in the Director's office; 3) Access to fiscal rules; 4) Utilize the VCR/TV for review of Use of Force tapes; 5) To utilize the ARS; 6) To put documentation into the Emergency Manual; 7) Looking for two grievances--Gwyn Campbell Bell and Annie Cossabone. (Exh 6.)

23. Gomez did not accept the reasons that complainant gave to justify being in his office. The surveillance videos established that complainant was there to read documents in Gomez's possession, not to use the VCR, access regulations or for any other legitimate purpose. Gomez had not authorized any employee to go through his working files. He never told complainant to not go through his working files.

24. Gomez concluded that complainant had "pilfered sensitive documentation and foraged through confidential paperwork without authorization or necessitated need." (Exh. 6.) He could not specifically identify a confidential document that complainant read, but he believed that all information in his office was confidential. Complainant "pilfered" the information by taking it with him in his head. Given his high rank (CO IV), complainant should have known better than to do that, which broke the integrity of the agency and violated the DOC Code of Ethics (Administrative Regulation 1450-1, Exh. 9), incorporating the Executive Order on Integrity in Government (Exh. 10), even though there was not a specific provision prohibiting complainant's conduct, Gomez believed. If he was looking for a response to the grievance of another employee, there were better ways to obtain the information than to go through all of the papers and files of the director. Gomez was also put off by complainant's demeanor at the 6-10 meeting, a demeanor of "so what?."

25. Gomez decided that complainant's misconduct was willful and so flagrant as to justify immediate dismissal. By letter dated September 10, 1999, the appointing authority terminated the employment of Brian Gonzales, explaining the seriousness of the conduct as follows:

Since March 9, 1999, YOS has been under scrutiny and many confidential items were maintained in this office. Files in the Director's office are not personnel files but working files that are highly confidential. No one has any right to view the information including management staff. Tape recording (sic) from 6-10 meetings have disappeared, Dr. Barry Glick's report was taken from this office, which was very sensitive, especially during the legislative audit.

. . . .

You had acceptable alternatives available, however, you elected to act in an illicit manner. For an individual in a position of trust, your willful misconduct is unprofessional, unacceptable, unethical and directly violates Statutory Code

of Ethics. Therefore, your actions cannot be tolerated, especially in a working environment where an individual in a position of authority is expected to mentor subordinate staff in pro-social behavior and thinking, in order to uphold honesty, integrity and respect within State government.

Exhibit 6.

26. Complainant filed a timely appeal of the disciplinary action on September 19, 1999.

DISCUSSION

I.

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App. 1995).

Respondent argues that complainant's misconduct was serious and willful, given that the surveillance videos left no doubt that complainant was in the Director's office for the sole purpose of reading documents in the possession of the Director, and complainant testified that he believed one-half of the documents left on the Director's desk by shift commanders was confidential. Even though there was no specific regulation, three other shift commanders testified that they were of the opinion that such conduct was a breach of ethics under the Staff Code of Conduct.

Complainant maintains that his conduct was trivial, not willful and was unworthy of immediate termination. Complainant argues that the phony July 28 memo, which was planted for complainant to find, represents "classic entrapment." And he was not given adequate notice of conduct that might result in termination in view of there being no specific governing policy.

II.

Rule R-6-2, 4 Code Colo. Reg 801, provides:

A certified employee except employees in the Senior Executive Service shall

be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. The nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination.

Rule R-6-8, 4 Code Colo. Reg. 801, provides:

Corrective action is intended to correct and improve performance or behavior and does not affect current base pay, status or tenure. It shall be a written statement that includes the areas for improvement, the actions to take, a reasonable amount of time, if appropriate, to make corrections; consequences for failure to correct; and, a statement advising the employee of the right to grieve and the right to attach a written explanation. It may also contain a statement that the corrective action will be removed from the official personnel records after a specified period of satisfactory compliance. A removed corrective action cannot be considered for any subsequent personnel action.

It is undisputed that this appointing authority did not issue a corrective action prior to the imposition of discipline. He not only imposed immediate discipline, but he imposed the employment death penalty--dismissal. In doing so, the appointing authority left no room for treating more harshly offenses with a victim, such as physical harm to another, or intentional damage to property or theft. To the appointing authority, snooping through his papers and files warranted the ultimate sanction, even for a correctional officer who possessed a good employment record since 1987 and rose through the ranks to become a captain (Correctional Officer IV). Lesser penalties, such as suspension or demotion, were given little, if any, consideration.

In order to sustain the imposition of discipline, regardless of the severity of the penalty, without a prior corrective action (notice) pursuant to R-6-2, it must be found that the employee's act was "so flagrant or serious" as to warrant immediate discipline. In order to be "serious," an act must be:

Important; weighty; momentous, grave, great, as in the phrases "serious bodily harm," "serious personal injury," etc.

Black's Law Dictionary at 1367 (6th Ed.).

"Serious and willful misconduct" is defined generally as follows:

In worker's compensation law, the intentional doing of something with the knowledge that it is likely to result in a serious injury, or with a wanton and reckless disregard of its possible consequences.

Black's Law Dictionary at 1367 (6th Ed.).

Complainant's conduct of snooping, though personally offensive, does not constitute willful misconduct so flagrant or serious as to make termination appropriate.

Although complainant testified to looking for a grievance response on at least one of the occasions he entered the Director's office (July 28/29), he was otherwise vague as to specific reasons on specified dates. The videotapes, viewed by the judge at hearing, suggest that complainant was looking for whatever might be of interest to him. However, he did not permanently remove any of the papers that he looked at. There is no evidence that he took anything. There is no evidence of a particular document he saw that was truly confidential. There is no evidence of any particular information that he obtained but should not have. There is no evidence that he used any information for an illicit purpose or to harm someone else in any way. There is no evidence of exactly what it was that he saw and read. And he did not enter the investigator's office despite being given a purpose in doing so.

Even though there was testimony that some shift commanders believed complainant's acts were a breach of the Staff Code of Conduct, there was no such official interpretation. It was not self-evident that complainant's conduct might lead to the termination of his employment. Complainant was entitled to notice that his conduct was grounds for immediate dismissal before the ax fell. Whatever an agency determines its policy to be, the policy must be clear, understandable and consistently applied before it can serve as the basis for discipline. A corrective action was required to afford the complainant the opportunity "to correct and improve [his] performance or behavior." R-6-8.

The appointing authority had more than one chance to issue a corrective action. It could have been done after he was informed that there were witnesses to complainant entering his office inappropriately. It could have been done subsequent to the viewing of each one of the surveillance videos. If complainant continued his behavior following proper notification that the conduct was proscribed, as well as of the potential consequences, which could have been confirmed via videotaping, dismissal may then have been within the range of the reasonable alternatives available to the appointing authority. Instead, the appointing authority allowed the activity to go on until he decided that the conduct was so flagrant or serious as to render immediate discipline proper. Rather than attempt to put a halt to complainant's doings, the appointing authority tried to make it worse by consenting to the investigator planting the July 28 memo to serve complainant with a purpose for entering the investigator's office if he was inclined to do so. He was not so inclined. Contrary to complainant's contention that the July 28 memo constituted "classic entrapment," however, the memo did not entrap him because he did not enter the inspector's office. The July 28 memo had no effect except to cause complainant to become upset.

This record does not sustain the conclusion that complainant's conduct was

sufficiently aggravated and willful to warrant imposition of immediate disciplinary action. Complainant did not knowingly or willfully use his state authority to obtain special advantage. He was not unable to perform his job duties and did not otherwise fail to comply with standards of efficient service.

III.

Section 24-50-125.5, C.R.S., provides for an award of attorney fees and costs if the personnel action initiated was frivolous, commenced in bad faith, malicious, done to harass, or otherwise groundless. In the present matter, respondent's disregard of Board rules R-6-2 and R-6-8 culminated in its failure to give complainant notice of a corrective action thus providing him the opportunity to correct his performance, and not re-evaluating his performance before dismissing him, is a demonstration of bad faith. In addition, the termination action was frivolous, if not malicious. Termination was excessive punishment and not within the range of available alternatives provided by the applicable rules. See R-8-34, 4 Code Colo. Reg. 801. It is likely that respondent could have avoided this litigation by adhering to the corrective action procedures. As long as an attorney fee award has a reasonable basis in law and is supported by substantial evidence in the record, it is proper. See *Hartley v. Department of corrections*, 937 P.2d 913 (Colo. App. 1997).

CONCLUSIONS OF LAW

1. Respondent's action was arbitrary, capricious or contrary to rule or law.
2. The discipline imposed was not within the range of alternatives available to the appointing authority.
3. Complainant is entitled to an award of attorney fees and costs.

ORDER

The disciplinary action is rescinded. Complainant is reinstated to his former position with full back pay and benefits, less any income he would not have earned but for the termination. Respondent shall pay complainant's reasonable attorney fees and costs incurred in pursuing his appeal.

DATED this _____ day of
January, 2000, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of January, 2000, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Charles F. Kaiser
Attorney at Law
1801 Broadway, Suite 1100
Denver, CO 80202

and in the interagency mail, addressed as follows:

Susan J. Trout
Assistant Attorney General
1525 Sherman Street, Fifth Floor
Denver, CO 80203
